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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-1673

ROBERT GORDON MILLER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

On Petition for a Writ of Certiorari to the Horry County Court of General Sessions

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Robert Gordon Miller (Petitioner) submits this reply to the arguments presented by the State of South Carolina in its brief in opposition to the petition for a writ of certiorari to the Horry County Court of General Sessions.

ARGUMENT IN REPLY

I.

The respondent state of South Carolina has opposed issuance of the writ solely on the basis of its claim that the unavailability of pretrial appellate review of double jeopardy claims by South Carolina criminal defendants constitutes an adequate state ground in support of the judgment below and deprives this Court of jurisdiction to consider petitioner's double jeopardy claim. This argument ignores the firmly-

established principle that a denial of a pretrial double jeopardy plea is a "final judgment" subject to immediate review by this Court under 28 U.S.C. §1257(3). Smalis v. Pennsylvania, 467 U.S. ___, 39 Cr.L. 3079, 3080 n. 4 (1986); Abney v. United States, 431 U.S. 651, 661-662 (1977).[1]

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[1] In Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 302-303 (1984), the Court explained the reasons why a pretrial denial of a double jeopardy claim must be regarded as a final judgment for purposes of federal review.

> We should keep in mind in this respect the unique nature of the double jeopardy right. In Abney v. United States, 431 U.S. 651 (1977), the Court held that denial of a motion to dismiss an indictment on double jeopardy grounds constitutes a final order for purposes of 28 U.S.C. §1291. That decision was based on the special nature of the double jeopardy right and the recognition that the right cannot be fully vindicated on appeal following final judgment, since in part the Double Jeopardy Clause protects "against being twice put to trial for the same offense." Id., at 661 (emphasis in original).

The fact that South Carolina law does not provide pretrial appellate review of such claims, State v. Miller, ___ S.C. ___, 337 S.E.2d 883 (1985), means nothing more than that the decision of the trial court denying petitioner's pretrial double jeopardy claim was under South Carolina law the judgment "by the highest court . . . in which a decision could be had." 28 U.S.C. §1257. Because the "finality" of the trial court's judgment derives from the nature of the constitutional guarantee against double jeopardy itself, Smalis v. Pennsylvania, supra, Abney v. United States, supra, it cannot be vitiated by the refusal of the state supreme court to entertain the merits of petitioner's constitutional claim until after he has already been wrongfully forced to undergo a second trial proceeding. The only effect on this Court's jurisdiction of

the state supreme court's dismissal of petitioner's pretrial appeal is that the writ of certiorari lies to the Horry County Court of General Sessions rather than to the South Carolina Supreme Court, and the present petition has been captioned and styled accordingly. See Stern, Gressman & Shapiro, Supreme Court Practice 139-141 (6th ed. 1986).

II.

On the merits of his double jeopardy submission, petitioner would note the very recent holding of this Court in Smalis v. Pennsylvania, supra, that "the Double Jeopardy Clause bars an appeal [of a judgment of acquittal] not only when it might result in a second trial, but also if reversal would translate into further proceedings devoted to the resolution of factual issues going to the elements of the offense charged."

Petitioner submits that Smalis supports his contention that his acquittal by the trial judge, albeit erroneous, bars the state from requiring him to undergo further trial proceedings at a sentencing hearing devoted to the resolution of many of the same factual issues previously decided in his favor at trial.

CONCLUSION

For the foregoing reasons and for those set forth in his petition for writ of certiorari previously filed in this Court, petitioner submits that the writ should be granted.

Respectfully submitted,

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